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IN THE

Supreme Court of the United States

October Term, 1949

No. 666

MONOLITH PORTLAND MIDWEST COMPANY, a corporation,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Summary Argument in Accordance With Rule 38 in Support of Petition for Certiorari.

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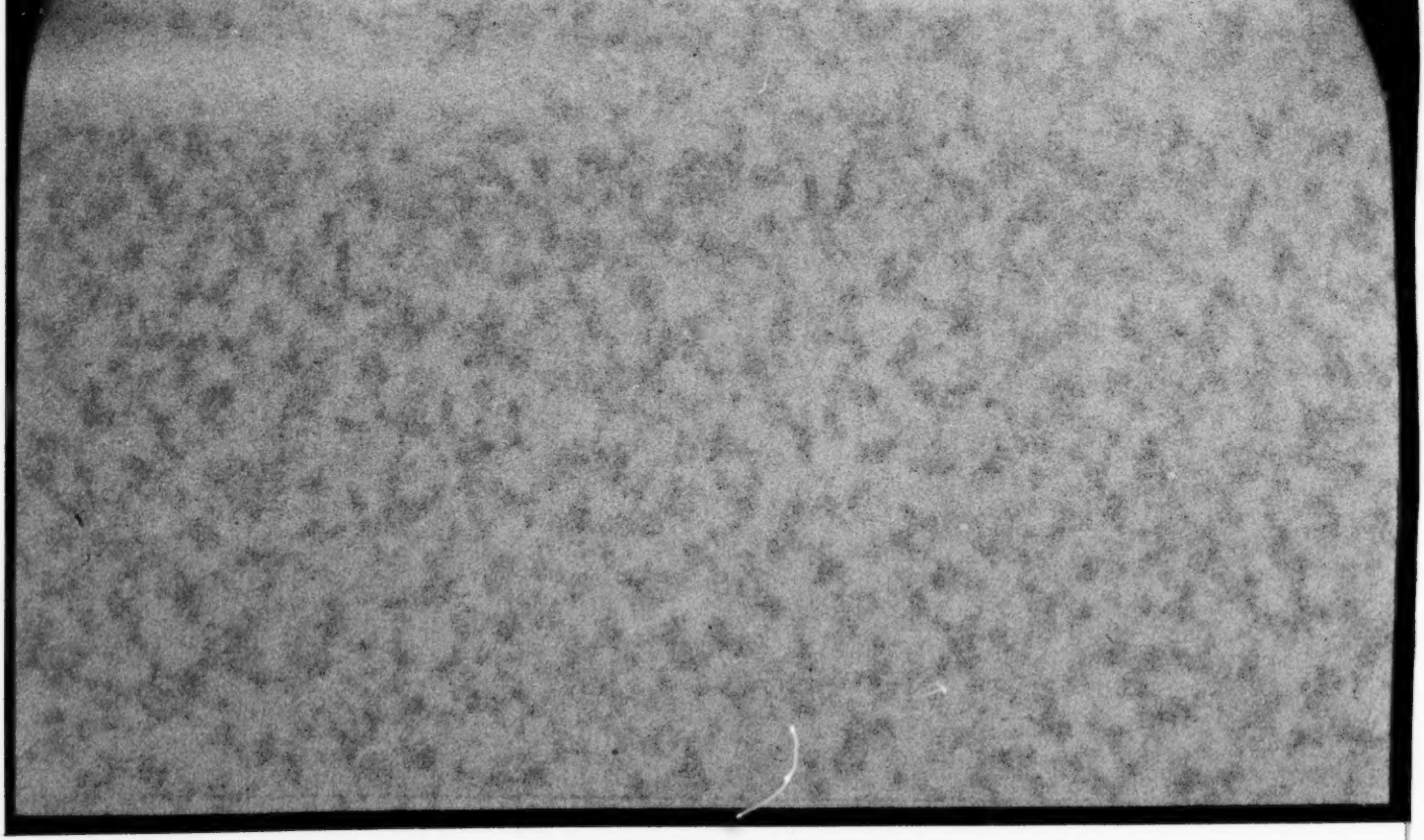

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No. .....

MONOLITH PORTLAND MIDWEST COMPANY, a corporation,
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vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Ninth Circuit, entered on the 21st day of December, 1949.

Opinion Below.

The Court of Appeals Opinion is reported at 178 F. 2d 854 [R. p. 543].

Jurisdiction.

The jurisdiction of the Court is invoked under Section 240 of the Judicial Code, as published in 28 U. S. C. A. Section 347a—1948 Edition.

Laws Involved.

The Contract Settlement Act of 1944 (41 U. S. C. A. Sections 101, *et seq.*);

The War Mobilization and Reconversion Act of 1944 (50 U. S. C. A. App., Sections 1651, *et seq.*);

Rules 12 and 56 of the Federal Rules of Civil Procedure, promulgated by this Court and the due process requirement of the Fourteenth Amendment to the Federal Constitution.

Questions Presented.

This petition presents for review:

(1) The first Federal Appellate Court decision interpreting the above war statutes in basic particulars;

(2) Whether or not an experimental contract—which provided for a trial run of a process, which would, if successful, permanently end our Nation's dependence upon overseas shipment of bauxite (the basic raw material needed in alumina manufacture)—is a prime contract for war production within the War Mobilization and Reconversion Act of 1944;

(3) If the contract is a prime contract for war production, is the procedure of the Contract Settlement Act of 1944 elective, exclusive, or did Congress in fact provide therein that none of the contractor's rights either substantively or procedurally should be impaired thereby?

(4) Has the Petitioner been denied its day in Court by a summary dismissal upon an issue not pleaded, which was caused by and resulted from a misconstruction of this Court's decisions as to the proper use of affidavits upon a motion to dismiss?

Reasons Relied Upon.

I.

The Contract Settlement Act of 1944, and the War Mobilization and Reconversion Act of 1944, constitute important legislation which has not been considered by this Court. New and important Federal questions are presented:

(a) The District Court held that the questions involved were new and novel, and that irreparable damage might be sustained in the event of a reversal of its judgment [R. pp. 511, 513];

(b) The Court of Appeals found no Federal case in point and relied upon a Supreme Court of Minnesota decision. *Stevens v. Federal Cartridge Corporation,* 226 Minn. 148, 332 N. W. 2d 312;

(c) This Court, in the case *Lichter v. U. S.* (1948), 334 U. S. 742, 68 Sup. Ct. 1294, 92 L. Ed. 1694, said that the Congressional approach involved in World War II legislation was a departure from its policy for World War I;

(d) The war conversion legislation and policies of Congress related thereto should be rendered clear and certain, as national economic health is involved as well as our national ability to gain quick and efficient industrial support in any emergency effort found to be needed to put industry back into another war effort; and

(e) The subject matter of this contract was a gigantic effort to permanently better our national industrial economy and our national defense necessities.

II.

The decision, if permitted to stand, will form a precedent for the proposition that a Federal Court, under the guise of interpretation, may amend a clear and unambiguous provision of a statute by deleting significant words therefrom.

III.

That prompt clarification of the litigants' rights is important, as, if the property involved were disposed of prior to the final conclusion of litigation, Respondent could lose from seven to twelve millions of dollars needed to reconstruct the plant, or Petitioner could lose, even if successful, the time involved in constructing the plant in addition to the added exhaustion of the life of its patents.

IV.

The decisions of this Court and the rules of Federal procedure were misconstrued and misapplied in the dismissal of this action without any issue supporting it.

Statement of the Case.

Petitioner and Respondent's predecessor agreed to construct a plant and to test therewith the feasibility of extracting alumina from its abundant source in the clays of this Nation [R. pp. 20-68].

Petitioner was to furnish the process, its knowledge concerning clay processing, and to provide the necessary personnel to supervise the acquisition of the needed properties and the designing, constructing and operating of the experimental test plant.

Respondent was to provide in advance the amounts of money required for the acquisition of the necessary prop-

erties, the designing and constructing of the plant, and for the cost of a test run of the plant.

The consideration to be received by Petitioner was:

(1) Any increase in the value of its process resulting from the test run;

(2) An option to purchase the plant after the completion of the test run; and

(3) A nominal fee during the period of the test run.

The consideration to be received by Respondent was:

(1) A plant constructed at cost;

(2) And operated for a trial period at direct cost plus a nominal fee;

(3) A right to the further services of Petitioner at cost; and

(4) A license for the use of the process in this and other plants.

On July 24, 1946, when construction of the plant was nearing completion, Respondent terminated the contract by a notice to Petitioner directing Petitioner to cease construction of the plant [R. p. 166]. The next day by telegram and letter Petitioner notified Respondent of its claims for this breach, money paid out in performance, and asked Respondent to advise its desires [R. p. 438]. They immediately conferred and on August 21, 1946, Petitioner again in writing made claims in the event Respondent would not permit Petitioner to continue in possession of the plant to test the process [R. pp. 440, 443]. On September 10, 1946, Respondent gave another and final notice of cancellation of the contract [R. p. 69]. On October 21, 1946, Respondent removed part of the

equipment from the plant, which equipment was necessary to test the process [R. p. 13].

On November 7, 1946, Petitioner filed suit in the State of California, seeking a declaration of its rights, an injunction to maintain the *status quo* of the property, and for damages. The suit was removed to the United States District Court. Respondent by its answer admitted the removal of the equipment [R. p. 102], and at no time has it pleaded by answer that the contract was a prime contract for war production or that Petitioner has in any manner failed to exhaust an administrative procedure [R. pp. 95, 208]. On February 13, 1947, Petitioner received notice from Respondent that it intended to declare the plant and its equipment surplus [R. p. 128], as a preliminary to its disposal. Upon Petitioner's application, the District Court issued, on February 25, 1947, its preliminary injunction restraining the Respondent from declaring the plant to be surplus and ousting Petitioner from possession of the plant and directing and maintaining a *status quo* [R. p. 139].

On December 30, 1947, Respondent for the first time by motion supported only by the conclusions contained in an affidavit of its associate director [R. p. 399] sought the dismissal of the action. The grounds were that Petitioner had not exhausted an administrative process it asserted was created by the Contract Settlement Act, and that the War Mobilization and Reconversion Act authorized the cancellation of this contract [R. p. 397].

Petitioner resisted this motion by allegations of its pleadings, affidavits and an amendment to its complaint, all of which created many important ultimate issues of fact, including,

> "whether or not Petitioner had an election and/or had exhausted the administrative provisions of the Contract Settlement Act,"

and

> "whether or not the contract was a prime contract for war production within the provisions of the War Mobilization and Reconversion Act," [R. pp. 434, 450, 461, 502].

On January 25, 1949, the District Court dismissed the action [R. p. 505]. On February 10, 1949, the District Court continued the preliminary injunction in force pending final determination of this cause, because it found that new and novel questions of law were involved, which had not been decided by a United States court of appellate jurisdiction, and that irreparable damage might result in the event of a reversal of the case [R. p. 513].

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 12,200, Monolith Portland Midwest Company, Appellant, vs. Reconstruction Finance

Corporation, Appellee; and that said judgment of the United States Court of Appeals for the Ninth Circuit and the judgment of the United States District Court for the Southern District of California, Central Division, be reversed by this Honorable Court and that your Petitioner may have such other and further relief as to this Honorable Court may seem meet and just.

Respectfully submitted,

MONOLITH PORTLAND MIDWEST COMPANY,
a corporation,

WELBURN MAYOCK,
Counsel for Petitioner.

Of Counsel for Petitioner:

ALFRED L. BLACK, JR.,
JOSEPH T. ENRIGHT,
DONALD J. DUNNE.

IN THE

Supreme Court of the United States

October Term, 1949

No. .....

MONOLITH PORTLAND MIDWEST COMPANY, a corporation,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation,
Respondent.

SUMMARY ARGUMENT IN ACCORDANCE WITH RULE 38 IN SUPPORT OF PETITION FOR CERTIORARI.

Petitioner Contends That War Conversion Legislation and Congressional Policies Should Be Rendered Clear and Certain to Protect the Economic Health of the Nation and Its Ability to Quickly and Efficiently Mobilize for Any Emergency.

I.

They Constitute a New Approach.

The Congressional policy for World Wars I and II has been compared by this court in *U. S. v. Bethlehem Steel,* 315 U. S. 289, 308, 86 L. Ed. 855, 867, and *Lichter v. U. S.,* 334 U. S. 742, 92 L. Ed. 1694, and it was there decided that the principal difference between the govern-

ment's handling of contracts during the first war and during and after the second war was that there should be no legal taking of any of the rights of the contractor arising during or in connection with the prosecution or conclusion of the second World War.

The Court of Appeals failed to carry this policy into effect when it judicially interpreted the provisions of the War Mobilization and Reconversion Act of 1944 (hereafter referred to as W.M.A.).

The W.M.A. authorized the contracting agencies to terminate certain contracts by virtue of Section 202 (50 U. S. C. A. App. 1657), which is as follows:

> "Any contracting agency shall terminate prime contracts for *war production* whenever in the opinion of the agency the performance under such contracts will not be needed for the prosecution of the war. . . ." (Emphasis added.)

The appellate decision starts itself off by assuming that the main question is whether a contractor may sue "The United States for damages." The Reconstruction Finance Corporation is not the United States.

Proceeding from this sovereign status assumed by the Court of Appeals, it was easy for it to assume all other questions, such as the nature of the contract and its remedies to be in favor of R.F.C.'s position.

The prime error is that this contract between private corporations is of no interest to the United States Government proper except as it has been made such by virtue of Section 202 of W.M.A.

It could not be made of interest within that Act unless it were in fact and were found to be a "prime contract for war production." War production is the keynote to

the termination power given by Section 202 and in many places in the Act production is specified as the only thing being considered.

The Court of Appeals was led to an extreme position when it held that Section 20(b) of Contract Settlement Act of 1944 (hereafter referred to as C.S.A.), authorized a C.S.A. created body to pre-judge what should or not be classed as a contract for war production under Section 202 of the termination statute.

The Court of Appeals ignored the basic policy-fixing section in C.S.A., being Section 20(e) which is as follows:

> "Nothing in this Act shall be deemed to impair or modify any war contract or any term or provision of any war contract or any assignment of any claim under a war contract, without the consent of the parties thereto, if the war contract, or the term, provision, or assignment thereof, is otherwise valid."

The Court of Appeals' decision that the Act is a mandatory remedy is diametrically opposed to this limitation in Section 20(e) that the Act shall not be used "to impair the rights of any contractor."

The Court of Appeals of necessity was precluded from noting or considering Section 20(e) if it were to hold the contractors' rights were by C.S.A. to be impaired to the extent that they must confine their remedies to C.S.A.

The court's opinion is not supported by the record in that part in which it bases its decision upon the practical considerations attending the existence of 100,000 War Department contracts. There were but four experimental contracts, of the kind considered herein, awarded in the entire aluminum-from-clay program [R. p. 453]. This

experimental contract was succinctly and accurately described and defined by Director Bunker of the Aluminum Division as follows:

> "It should be understood that this plant is an experimental unit with the sole objective of determining whether or not the process can be applied successfully to the production on a large scale of alumina from anorthosite and/or clay." [R. p. 460.]

II.

The Record Does Not Sustain the Opinion.

The Court of Appeals' decision erroneously concluded that ninety days had not passed after Petitioner's notice, accompanied by an offer to negotiate, had been given of its termination claim. This is contrary to the record as it shows that on July 24, 1946 [R. p. 166] Respondent "terminated" Petitioner's contract within the language of Subsection (d) of Section 3 and Subsection (b) of Section 11 of C.S.A., which provides that the whole or any part of work being terminated or suspended constitutes a termination within C.S.A.

On July 25, 1946, Petitioner advised Respondent that it intended to present a termination claim and offered to negotiate in connection therewith [R. p. 438]. The Court of Appeal's statement that the only intent that can be gathered from the letters giving notice is that Petitioner will seek *"damages"* if Respondent fails to perform, would seem to make it rather difficult to distinguish this from a notice that Petitioner was intending to present a termination claim. This, however, was the particular in which the Court of Appeals justified itself by its asserted unwillingness to engage in legal legerdemain.

This statement in the opinion is on a par with the reference to these two letters by the Court of Appeals [R. p. 552], when it said that these letters were "written after Appellant received instructions to suspend work on the plant" but "prior to the date it was notified that the contract was terminated." This glaring overlooking of C.S.A. Sections 3(d) and 11(b) emphasizes two things. The first is that the Court of Appeal's approach was that it was reviewing a damage claim against the United States, and the other, the futility of attempting to correctly decide cases upon issues not made by the pleadings. But a slight consideration of these two sections of the statute would have quickly found therein that, as to C.S.A., a termination is said to be "to cease or suspend all *or a substantial part of the work*" without terminating the contract. Giving the proper effect to these parts of the statute in its analysis would have compelled the Court of Appeals to reverse the case as its stated premise would then demonstrate that the termination was actually followed by a notice that Petitioner would claim damages for termination and that it was willing to negotiate and,—that more than ninety days had elapsed thereafter prior to suit.

On November 7, 1946, or one hundred five (105) days after this Petitioner had advised Respondent of its intention to make a termination claim by claiming damages, and indicated a willingness to negotiate,—this court action was filed. [R. p. 77.] If this had been considered by the Court of Appeals, it would have been a complete answer to its inquiry as to the expiration of ninety days in connection with any part of C.S.A.

The Court of Appeals erred in not considering Petitioner's presentation of proofs concerning reimbursables

as being in this regard a compliance with C.S.A. Such suppression of the record permitted the Court of Appeals to say these were included within C.S.A. for penal purposes without giving the legal advantage which came from the admitted proof of filing, negotiations and requests in connection therewith. These were completely adequate, as shown by the record, upon any theory which could be claimed as to compliance with C.S.A. provisions, and admittedly had occurred many times prior to the ninety days preceding the filing of the case.

Ignoring Section 20(e), and assuming this to be a "prime contract for war production" and that sovereignty was granted by C.S.A. to any act performed by R.F.C. in disposing of its contractual liabilities it found on its books at the end of World War II, enabled the court to ignore the plain statement of intent of Congress as follows:

> *"Remedial Provisions:* A further feature of the bill that deserves approval is that relating to the rights of claimants. A procedure has been set up that will, in my opinion, give any claimant every reasonable right to obtain justice without going into court with the consequent expense and delay, yet if the claimant does not wish to avail himself of such procedure there is nothing in this bill to prevent him from going into court to establish any right that he feels belongs to him—or such claimant may avail himself of the procedure provided in the act, designed for speedy settlement of the claim, and if not satisfied may then go into court. *No existing remedy that a claimant now has under the law is taken from him, but in*

addition thereto he is given an opportunity to avail himself of a settlement procedure that can facilitate his settlement if he so desires. This is fair and just to all parties concerned, Government and claimant." (Congressional Record, Vol. 90, Part 5, 78 Congress, Second Session, p. 6153.) (Emphasis added.)

III.

Misapplication,—Court's Summary Procedure Rules.

The Court of Appeals ignored Rule 12 of the Federal Rules of Civil Procedure established by this court. It specifically provides that a motion to dismiss, for failure to state a claim upon which relief can be granted (failure to exhaust an administrative remedy) shall be treated as a motion for summary judgment and disposed of as provided by Rule 56. Recently this court in *Founatin v. Fillson,* 93 L. Ed. Ad. Op. 768, approved the holding in *Farrel v. District of Columbia* (U. S. Ct. of App. D. C.), 153 F. 2d 647, 648, that under Rule 56 affidavits can be used only for the purpose of discovering whether there is an issue of fact and not for deciding such an issue. The record contains no pleading upon the issue as to whether or not Petitioner complied with provisions of C.S.A. yet the dismissal was upon this ground, and all this notwithstanding Petitioner's affidavits which Petitioner believes demonstrated that it had complied with C.S.A. [R. pp. 434, 450].

This disregard of this court's rules, is matched by a disregard of the statutory provision in C.S.A., Section 13[c][3] which limits the trial court's authority to a "remanding" or retaining for trial the controversy.

IV.

Great and Far-reaching Consequences Possible.

A review of the Court of Appeals' opinion is necessitated by the importance of the subject matter here involved. Alumina is in great and needed demand for industrial and defense purposes. It is produced from a raw material called bauxite, substantially all of which is imported. This venture was an effort to permanently solve this domestic shortage [R. pp. 465, 490].

The official agency of the U. S. Government best qualified to pass upon the problem has published this report upon Petitioner's process:

> "Small-scale laboratory tests supplemented by pilot-plant runs have demonstrated that the alumina and soda occurring in the Wyoming anorthosite from the Laramie Range can be extracted and recovered satisfactorily by the lime-soda process." [R. p. 501.]

It may be added that Respondent has not disagreed with this Bureau of Mines position.

The record definitely shows that enemy submarines had reduced our needed imports of bauxite (approximately 3,000,000 tons per year) [R. p. 451] early in World War II to dangerous proportions. It surely requires no proof at this time to convince:

(1) that the threat of the next war carries with it just as great an enemy submarine menace, and

(2) that the time taken, four years [R. pp. 451 and 166], to bring this experimental plant to "near comple-

tion" could conceivably be many times greater than a kind providence would allow for a solution of this shortage in the next holocaust. This, added to the staggering losses to the parties herein which could result from a premature divorcing of this plant from the process it was intended to test, would, we respectfully urge, be a reason to hope that this record may be found worthy of review by this court.

Respectfully submitted,

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a corporation,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 666

MONOLITH PORTLAND MIDWEST COMPANY, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Southern District of California, Central Division, rendered no formal opinion. The oral opinion of that court is set forth at pp. 524-527 of the record. The opinion of the Court of Appeals for the Ninth Circuit (R. 543) is reported at 178 F. 2d 854.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 21, 1949 (R. 555). The petition for a writ of certiorari was filed on March 13, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below erred in affirming the dismissal of the suit brought by petitioner, a war contractor seeking termination damages and injunctive relief, on the ground that petitioner had failed to utilize the available

procedures for administrative settlement and review under the Contract Settlement Act of 1944, 41 U.S.C. 101-125.

Statute Involved

The pertinent provisions of the Contract Settlement Act of 1944, 58 Stat. 649, 41 U.S.C. 101 *et seq.*, and the War Mobilization and Reconversion Act of 1944, 58 Stat. 785, 50 U.S.C. App. 1651 *et seq.*, are set forth in the Appendix, *infra*, pp. 10-15.

Statement

On June 28, 1943, petitioner contracted with Defense Plant Corporation, a former subsidiary of respondent,[1] to supervise the construction of a plant at Laramie, Wyoming to extract alumina from native anorthosite ores by a new and untried process (R. 20-68). After construction, petitioner was to operate the plant. The production of alumina and the expansion of capacity for such production was deemed "* * * important in the interest of the National Defense Program * * *", and the development of the process and facility involved in this case was specifically found to be thus essential (R. 20-21, 26, 27). Plant construction under the contract was not terminated immediately upon cessation of military hostilities in view of a finding at that time by the Director of War Mobilization and Reconversion that continuation would benefit the Government (R. 166). Subsequently, however, after some inquiry into the cost of readying the plant for operation (R. 164-165), the Director determined that it would be in the best interest of the Government to effect the termination of the operating agreement with the petitioner (R. 166). Accordingly, respondent gave petitioner a preliminary or "stop work" notice on

[1] In 1945, Congress dissolved Defense Plant Corporation and respondent succeeded to Defense Plant Corporation's rights and liabilities. Joint Resolution (Public Law 109) of June 30, 1945, c. 215, 59 Stat. 310.

July 24, 1946 (R. 166).[2] A notice of termination, pursuant to Section 202 of the War Mobilization and Reconversion Act of 1944, 50 U. S. C. App. 1657, was served on petitioner on September 10, 1946, to be effective 30 days after receipt (R. 69).

Petitioner thereupon commenced an action in the Superior Court of the State of California, County of Los Angeles (R. 2) on November 7, 1948 (R. 79), less than two months from the date of termination.[3] In that action, petitioner sought the right to possession of the plant, the opportunity to operate it, and an injunction against Reconstruction Finance Corporation's continued control of the plant. Petitioner prayed for a judgment of $516,000 to complete the acquisition and construction program and $1,200,000 for the management and operation of the plant or, as an alternative to control and operation, $7,500,000 as general damages. Also, $197,-524.76 was sought as money due and owing. (R. 18-20.)

Respondent caused the action to be removed to the United States District Court for the Southern District of California (R. 93). By answer and motion, respondent raised the defense that the complaint failed to state a claim upon which relief could be granted since petitioner had neither pursued nor exhausted its administrative rem-

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[2] The petition mistakenly refers to this communication as a termination notice (Pet. 5). The communication of July 24, 1946, explicitly stated that "* * * this is a stop work notice only and should not be construed as a notice of termination of your operating agreement" (R. 168). Petitioner's subsequent letters to respondent on July 25, 1946, and August 21, 1946, clearly show petitioner's understanding that the contract had not been formally terminated (R. 438, 440). Both courts below found that notice of termination was given, as described above, on September 10, 1946 (R. 504, 544-545). And the court below observed that petitioner's letters of July and August, 1946, were no more than a protest against expected termination "* * * and a demand for a continuance of the contract. * * *" (R. 552).

[3] Petitioner's refusal to utilize the required administrative procedure for termination under the Contract Settlement Act may be traced to its insistence that its contract with respondent was to be treated, in so far as benefit to petitioner was involved, as a contract with a private corporation (R. 438, 441). And see Pet. Br. 2.

edies under the Contract Settlement Act of 1944, 41 U. S. C. 101 *et seq.* (R. 396, 397-398). The issue thus raised was brought on for a preliminary hearing (R. 398-399) which resulted in the dismissal of petitioner's suit by the district court (R. 503-505). The district judge specifically found that petitioner had not "* * * exhausted the administrative remedy afforded it by said Act. * * *"[4] The court below affirmed the district court's judgment of dismissal (R. 555).

Argument

1. The central issue presented by this case is petitioner's assertion of a right to sue the respondent upon termination of its contract without prior recourse to prescribed administrative procedures for settlement of termination claims. We submit that the question thus presented is not of great practical importance and does not merit review. As indicated in the Brief in Opposition in *Stevens* v. *Federal Cartridge Corporation*, No. 466, this Term, certiorari denied, 338 U. S. 942, substantially all war contractors, both prime contractors and subcontractors, have accepted and utilized the adminis-

[4] The district court judgment recites that the defenses urged by respondent at the preliminary hearing were treated as having been raised both under Rule 12 and Rule 56 of the Federal Rules of Civil Procedure (R. 503-504). The summary disposition of the case by the district court is attacked by petitioner on the ground that issues of fact were thus improperly decided (Pet. 7; Pet. Br. 7). We see no merit to this attack. Clearly, the question whether the Contract Settlement Act required preliminary recourse and exhaustion of administrative procedures under the statute is not a question of fact. Nor does the problem of whether the contract here involved may be classified as a war contract within the meaning of the War Mobilization and Reconversion Act or the Contract Settlement Act of 1944 present any question of fact. See *infra*, pp. 6-7. As to petitioner's alternative claim, that it had in fact complied with prescribed administrative procedure by writing letters in July and August of 1946, the court below observed that petitioner had not "* * * made * * * even a colorable compliance with the Act. * * *" (R. 553). Finally, petitioner makes no contention that it actively pursued any effort to effect administrative determination of its claims prior to the time of instituting this litigation.

trative machinery provided by and under the Contract Settlement Act of 1944, with the result that the vast problem of settlement of termination claims is now substantially completed.[5] The basic congressional objective in passing the Act, the speedy disposition of such claims, has been attained within the framework of administrative settlement procedures.[6] The almost universal acceptance of administrative and review machinery under the statute for termination claim settlement stresses the inappropriateness of certiorari to review petitioner's claim, a claim which is not to our knowledge being pressed by any other war contractor, that it be excused recourse to such machinery and be permitted to proceed directly by court action.

Moreover, we suggest that the holding below is not of such compulsive nature as to make review in any way necessary. Petitioner has been remitted by the decision of the Court of Appeals to its administrative remedy. Subsequent to utilization of that remedy, petitioner may seek appropriate court review. In no sense have the courts below in this case ruled on the merits of petitioner's termination claim. Their holdings are in accord with the general principles repeatedly applied in decisions of this Court which deal with suits prematurely brought. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41; *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540; *Aircraft & Diesel Corp.* v.

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[5] Contract Terminations and Settlements, Twenty Second Report of the General Services Administration to The Congress, January 1950, p. 1: "The terminations pending settlement are slightly less than 0.08% of the total number of war contracts cancelled at the convenience of the Government since the beginning of war production and 0.68% of the amount involved." Of 320,093 contracts terminated from the beginning of war production to December 31, 1949, only 258 were pending settlement as of December 31, while 319,835 were settled as of December 31. In percentage figures, 99.9% were settled while .1% were pending settlement. Of 66.3 billions of dollars of cancelled commitments, 65.9 billions were settled as of December 31, 1949 while only .4 billion were pending settlement, or .7%.

[6] Contract Settlement Act of 1944, §1(a), (b), 41 U.S.C. 101(a), (b), Appendix, *infra*, p. 10; S. Rep. 836, 78th Cong., 2d sess., p. 1; H. Rept. 1590, 78th Cong., 2d sess., pp. 18, 19.

Hirsch, 331 U.S. 752; *Lichter* v. *United States*, 334 U.S. 782, 789-793. The lack of practical significance of the position asserted by petitioner herein is emphasized by the fact that, subsequent to the decision below, petitioner has filed an appropriate claim under Section 13(a)(2) of the Contract Settlement Act of 1944, 41 U.S.C. 113(a)(2), with respondent. Even if this filing be regarded as protective only, it underscores the fact that no substantial rights of petitioner have been impaired and that the holdings below merely guarantee to the Government the proper opportunity for administrative consideration and settlement contemplated by Congress.

2. Nor is there any merit to the principal contentions which petitioner makes in support of its claimed right of immediate access to the courts. Petitioner principally argues that its contract was not a war contract within the reach of the War Mobilization and Reconversion Act of 1944 and the Contract Settlement Act of 1944 (Pet. 2; Pet. Br. 2). Further, petitioner argues that, in any event, no prior recourse to the administrative procedure or settlement of termination claims under the Contract Settlement Act is required. In our view, the court below has carefully and completely answered these and other subsidiary contentions made by petitioner.

(a) The argument that petitioner's contract cannot be viewed as a war contract for the purpose of the statutes here involved does not even possess plausibility. If the question were considered as one of fact open to inquiry, we think it plain that the major, if not the entire purpose of the construction and proposed operation of the alumina plant, was to meet the needs of national defense. See R. 548-549 and Section 3(a) of the Contract Settlement Act, 41 U.S.C. 103(a), Appendix, *infra*, p. 10. Such was the avowed purpose of the contract according to both contracting parties. See Statement, *supra*, p. 2. The status of the contract is not, however, left open to inquiry. As the court below observed, the War Mobilization and Reconversion Act and the Contract Settlement Act are necessarily correlated. Power and procedure for settling and adjusting termination claims under the latter statute

comes into play only upon the exercise of the termination power created in the "contracting agency" by Section 202 of the War Mobilization and Reconversion Act. 50 U.S.C. App. 1657, Appendix, *infra*, p. 15. "Contracting agency" is specifically defined to include the respondent and its subsidiary corporations under both statutes. 50 U.S.C. App. 1676; 41 U.S.C. 103(g), Appendix, *infra*, p. 11. Thus qualified as a "contracting agency," respondent exercises final and conclusive authority to categorize any given contract as a war contract, a determination which "shall not be reopened,, annulled, modified, set aside, or disregarded * * * in any suit, action, or proceeding except as provided in this chapter." Sections 3(m) and 20(b) of the Contract Settlement Act of 1944, 41 U.S.C. 103(m), 120(b), Appendix, *infra*, pp. 11, 14-15.[7] There is, of course, no dispute that the contract in this case was administratively classified as a war contract (R. 69, 166).

(b) Petitioner's second contention, as noted above, is to the effect that, while it may elect to pursue its administrative remedy, it is not compelled to do so. In rejecting this contention, the court below found it sufficient to point to the essential congressional purpose involved in the passage of the Contract Settlement Act, which is the expert and speedy handling of termination claims, and to the obvious result of judicial permission to contractors to "* * * bypass the administrative determination * * *" (R. 550). Specific sections of the statute and regulations thereunder, read in the light of this clear congressional purpose, fully support the conclusion thus reached. Power to issue necessary and appropriate regulations is specifically given to the Adminis-

[7] Throughout this proceeding, petitioner has contended that, for the purpose of this case, respondent is a purely private corporation and not to be considered as an agency of the United States (Pet. Br. 2). We think it too well settled to require citation that the United States may freely utilize its corporate agencies for governmental purposes. That it has done so in connection with the subject matter of the instant case is completely clear from the specific references, set out above, to respondent as contracting agency for the purpose of the statutes here involved.

trator of General Services and to contracting agencies. Section 4(c) of the Contract Settlement Act, 41 U.S.C. 104(c), Appendix, *infra*, pp. 11-12. Pursuant to authority conveyed by the Section, respondent required the submission of a claim for administrative determination in the event that settlement could not be reached by agreement. 13 C.F.R. (1944 Sup.) 50.3.* Power to require primary recourse to administrative procedures established by regulation seems clearly to have been intended by Congress. See H. Rep. 1590, 78th Cong., 2d sess., p. 24. Only after utilization and exhaustion of the administrative procedure can the contractor go to court. Those provisions of the statute which describe the terms upon which recourse to courts may be obtained by contractors clearly contemplate prior administrative consideration and handling of termination claims. Section 13(a), (b), (c) of the Contract Settlement Act of 1944, 41 U.S.C. 113(a), (b), (c), Appendix, *infra*, pp. 12-14. The right to judicial review is specifically geared to a review of administrative findings or to action in the event that the contracting agency fails to make requested findings. See H. Rep. 1590, *supra*, p. 25.

(c) In connection with both of the above-described arguments, petitioner infers the unconstitutionality of retroactive application of the War Mobilization and Reconversion Act or the Contract Settlement Act to the contract here involved. As pointed out by the court below, it has long been well settled that the United States may terminate and settle war contracts without answering in court for damages, that the power so to terminate does not depend upon specific provisions of a contract, and that the power may be retroactively applied (R. 547 and cases cited). *United States* v. *Corliss Steam-Engine*

* 13 C.F.R. (1944 Supp.) "50.3 *Settlements not made by agreement.* * * * (b) In cases where the contractor and the company are unable to settle a claim in full by agreement and the contractor desires to have the company determine the amount due on the claim or unsettled part pursuant to clause (2) of subsection (a) of section 13 of the act, the contractor shall make written demand on the company for such determination."

Company, 91 U.S. 321. Moreover, the "* * * judicial determination even of constitutional issues ordinarily must await the exhaustion of prescribed administrative remedies. * * *" (R. 547.) *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752.

Conclusion

For the reasons set forth above, we respectfully submit that the petition for certiorari should be denied.

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March 1950

APPENDIX

Contract Settlement Act of 1944 (58 Stat. 649, 41 U. S. C. 101 *et seq.*).

SECTION 1. The Congress hereby declares that the objectives of this Act are—

(a) to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit;

(b) to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts, and adequate interim financing until such final settlement;

(c) to assure uniformity among Government agencies in basic policies and administration with respect to such termination settlements and interim financing;

(d) to facilitate the efficient use of materials, manpower, and facilities for war and civilian purposes by providing prime contractors and subcontractors with notice of termination of their war contracts as far in advance of the cessation of work thereunder as is feasible and consistent with the national security;

(e) to assure the expeditious removal from the plants of prime contractors and subcontractors of termination inventory not to be retained or sold by the contractor;

(f) to use all practicable methods compatible with the foregoing objectives to prevent improper payments and to detect and prosecute fraud.

* * * * * * * *

SEC. 3. As used in this Act—

(a) The term "prime contract" means any contract, agreement, or purchase order heretofore or hereafter entered into by a contracting agency and connected with or related to the prosecution of the war; and the term "prime contractor" means any holder of one or more prime contracts.

* * * * * * * *

(c) The term "war contract" means a prime contract or a subcontract; and the term "war contractor" means any holder of one or more war contracts.

• • • • • • • •

(g) The term "contracting agency" means any Government agency which has been or hereafter may be authorized to make contracts pursuant to section 201 of the First War Powers Act, 1941, and includes the Reconstruction Finance Corporation and any corporation organized pursuant to the Reconstruction Finance Corporation Act (47 Stat. 5), as amended, the Smaller War Plants Corporation, and the War Production Board.

(h) The term "termination claim" means any claim or demand by a war contractor for fair compensation for the termination of any war contract and any other claim under a terminated war contract, which regulations prescribed under this Act authorize to be asserted and settled in connection with any termination settlement.

• • • • • • • •

(m) The term "final and conclusive", as applied to any settlement, finding, or decision, means that such settlement, finding, or decision shall not be reopened, annulled, modified, set aside, or disregarded by any officer, employee, or agent of the United States or in any suit, action, or proceeding except as provided in this Act.

SEC. 4. • • •

(b) In order to insure uniform and efficient administration of the provisions of this Act, the Director, subject to such provisions, by general orders or general regulations—

(1) shall prescribe policies, principles, methods, procedures, and standards to govern the exercise of the authority and discretion and the performance of the duties and functions of all Government agencies under this Act; and

(2) may require or restrict the exercise of any such authority and discretion, or the performance of any such duty or function, to such extent as he deems necessary to carry out the provisions of this Act.

(c) The exercise of any authority or discretion and the performance of any duty or function, conferred or imposed on

any Government agency by this Act, shall be subject to such orders and regulations prescribed by the Director pursuant to subsection (b) of this section. Each Government agency shall carry out such orders and regulations of the Director expeditiously, and shall issue such regulations with respect to its operations and procedures as may be necessary to carry out the policies, principles, methods, procedures, and standards prescribed by the Director. Any Government agency may issue such further regulations not inconsistent with the general orders or regulations of the Director as it deems necessary or desirable to carry out the provisions of this Act.

* * * * * * * *

SEC. 11. (a) In order to facilitate the efficient use of materials, manpower, and facilities for war and civilian purposes, each contracting agency—

(1) shall provide its prime contractors with notice of termination of their prime contracts as far in advance of the cessation of work thereunder as is feasible and consistent with the national security without permitting unneeded production or performance;

(2) shall establish procedures whereby prime contractors shall provide affected subcontractors with immediate notice of termination; and

(3) shall permit the continuation of some or all of the work under a terminated prime contract whenever the agency deems that such continuation will benefit the Government or is necessary to avoid substantial injury to the plant or property.

(b) Whenever a contracting agency hereafter directs a prime contractor to cease or suspend all or a substantial part of the work under a prime contract, without terminating the contract, then, unless the contract provides otherwise, (1) the contracting agency shall compensate the contractor for reasonable costs and expenses resulting from such cessation or suspension, and (2) if the cessation or suspension extends for thirty days or more, the contractor may elect to treat it as a termination by delivering written notice of his election so to do to the contracting agency, at any time before the contracting agency directs the prime contractor to resume work under the contract.

* * * * * * * *

SEC. 13. * * *

(b) Whenever any war contractor is aggrieved by the

findings of a contracting agency on his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may, at his election—

(1) appeal to the Appeal Board in accordance with subsection (d) of this section; or

(2) bring suit against the United States for such claim or such part thereof, in the Court of Claims or in a United States district court, in accordance with subsection (20) of section 24 of the Judicial Code (28 U. S. C. 41 (20)), except that, if the contracting agency is the Reconstruction Finance Corporation, or any corporation organized pursuant to the Reconstruction Finance Corporation Act (47 Stat. 5), as amended, or any corporation owned or controlled by the United States, the suit shall be brought against such corporation in any court of competent jurisdiction in accordance with existing law.

(c) Any proceeding under subsection (b) of this section shall be governed by the following conditions:

(1) When any contracting agency provides a procedure within the agency for protest against such findings or for other appeal therefrom by the war contractor, the war contractor, before proceeding under subsection (b) of this section, (i) in his discretion may resort to such procedure within the time specified in his contract or, if no time is specified, within thirty days after the delivery to him of the findings; and (ii) shall resort to such procedure for protest or other appeal to the extent required by the Director, but failure of the contracting agency to act on any such required protest or appeal within thirty days shall operate as a refusal by the agency to modify its findings. Any revision of the findings by the contracting agency, upon protest or appeal within the agency, shall be treated as the findings of the agency for the purpose of appeal or suit under subsection (b) of this section. Notwithstanding any contrary provision in any war contract, no war contractor shall be required to protest or appeal from such findings within the contracting agency except in accordance with this paragraph.

(2) A war contractor may initiate proceedings in accordance with subsection (b) of this section (i) within ninety days after delivery to him of the findings by the contracting agency, or (ii) in case of protests or appeal within the agency, within ninety days after the determination of such protest

or appeal, or (iii) in case of failure to deliver such findings, within one year after his demand therefor. If he does not initiate such proceedings within the time specified, he shall be precluded thereafter from initiating any proceedings in accordance with subsection (b) of this section, and the findings of the contracting agency shall be final and conclusive, or if no findings were made, he shall be deemed to have waived such termination claim.

(3) Notwithstanding any contrary provision in any war contract, the Appeal Board or court shall not be bound by the findings of the contracting agency, but shall treat such findings as prima facie correct, and the burden shall be on the war contractor to establish that the amount due on his claim or part thereof exceeds the amount allowed by the findings of the contracting agency. Whenever the Appeal Board or court finds that the war contractor failed to negotiate in good faith with the contracting agency for the settlement of his claim or part thereof before appeal or suit thereon, or failed to furnish to the agency any information reasonably requested by it regarding his termination claim or part thereof, or failed to prosecute diligently any protest or appeal required to be taken under subsection (c) (1) (ii) of this section, the Appeal Board or court (i) may refuse to receive in evidence any information not submitted to the contracting agency; (ii) may deny interest on the claim or part thereof for such period as it deems proper; or (iii) may remand the case to the contracting agency for further proceedings upon such terms as the Appeal Board or court may prescribe. Unless the case is remanded, the Appeal Board or court shall enter the appropriate award or judgment on the basis of the law and facts, and may increase or decrease the amount allowed by the findings of the contracting agency.

(4) Any such proceedings shall not affect the authority of the contracting agency concerned to make a settlement of the termination claim, or any part thereof, by agreement with the war contractor at any time before such proceedings are concluded.

* * * * * * * *

SEC. 20. * * *

(b) Any contracting agency may prescribe the amount and kind of evidence required to identify any person as a war contractor, or any contract, agreement, or purchase order as a war contract for any of the purposes of this Act. Any deter-

mination so made that any person is a war contractor, or that any contract, agreement, or purchase order is a war contract, shall be final and conclusive for any of the purposes of this Act.

• • • • • • • •

War Mobilization and Reconversion Act of 1944 (58 Stat. 785, 50 U. S. C. 1651 *et seq.*).

SECTION 101. • • •

(b) The following agencies shall be placed within the Office of War Mobilization and Reconversion and shall exercise their functions subject to the general supervision of the Director:

(1) Office of Contract Settlement, created by the Contract Settlement Act of 1944.

SEC. 202. Any contracting agency shall terminate prime contracts for war production whenever in the opinion of the agency the performance under such contracts will not be needed for the prosecution of the war, and shall not continue performance under such contracts merely for the purpose of providing business and employment, or for any purposes other than the prosecution of the war, unless the Office of War Mobilization and Reconversion finds that the continuation of some or all of the work in process under any such contract will benefit the Government or is necessary to avoid substantial physical injury to a plant or property.

• • • • • • • •

SEC. 601. When used in this Act—

• • • • • • • • •

(b) The term "contracting agency" means any Government agency which has been or hereafter may be authorized to make contracts pursuant to section 201 of the First War Powers Act, 1941, and includes the Reconstruction Finance Corporation and any corporation organized pursuant to the Reconstruction Finance Corporation Act (47 Stat. 5), as amended, and the Smaller War Plants Corporation.

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IN THE

Supreme Court of the United States

October Term, 1949
No. 666.

MONOLITH PORTLAND MIDWEST COMPANY, a corporation,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation,
Respondent.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Summary Argument in Accordance With Rule 38 in Support of Petition for Certiorari.

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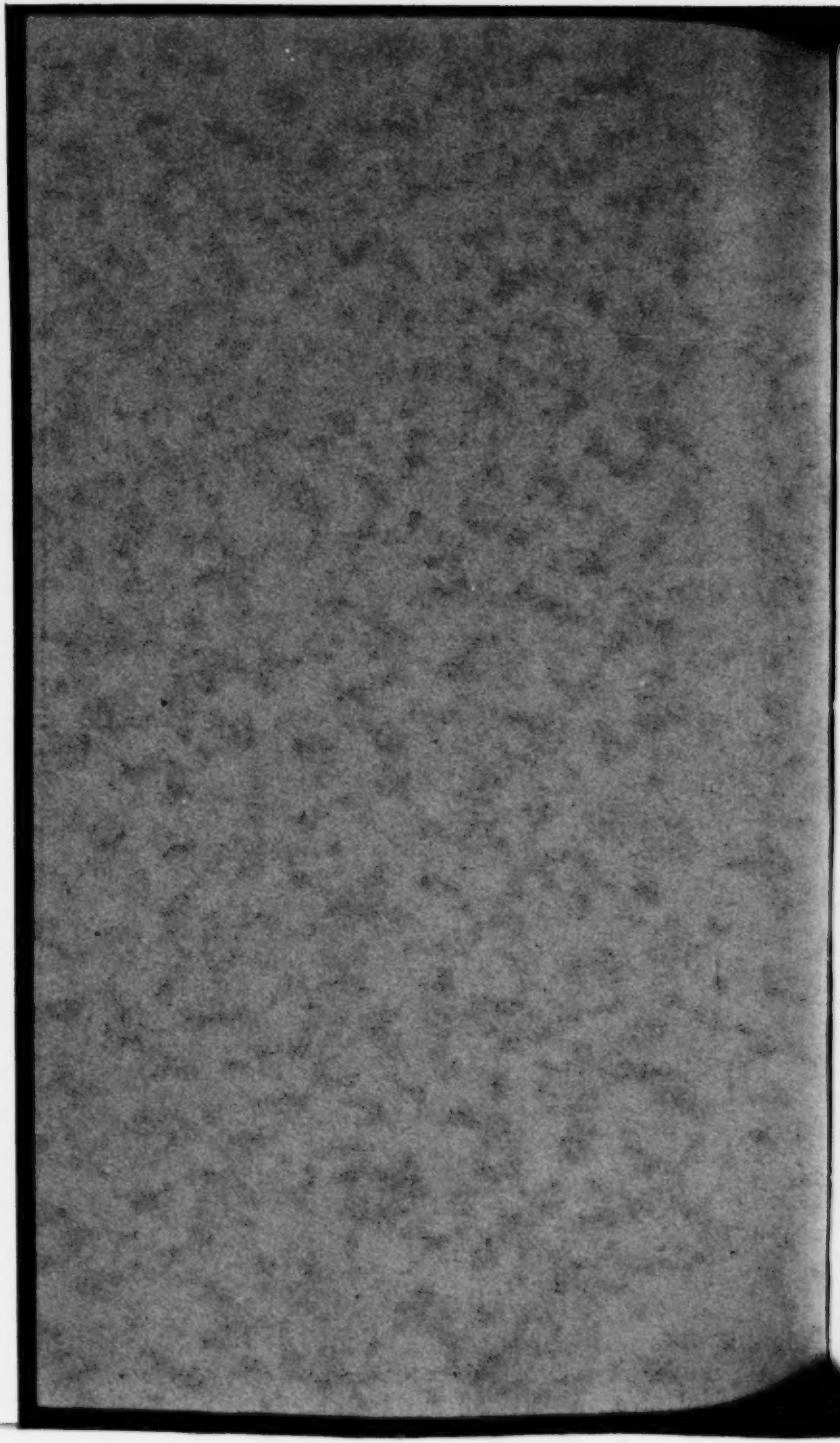

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Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Summary Argument in Accordance With Rule 38 in Support of Petition for Certiorari.

Your petitioner, Monolith Portland Midwest Company, alleges that the Petition for Certiorari was denied on April 10, 1950. That petition is made an appendix to, and is thereby realleged in support of this Petition for Rehearing.[1]

Your petitioner succinctly and briefly submitted an argument in support of that petition. The office of the Solicitor General, in failing to reply to the questions presented,

[1]Petition for rehearing is properly applied to an order denying certiorari. *Simpson v. Commissioner,* 321 U. S. 226, 88 L. Ed. 688.

reasons relied upon, and points of petitioner's argument, committed the same error as did the Honorable Ninth Court of Appeals. The Solicitor's error factually lies in his comparison of the contract in the instant case (there being only four such experimental contracts awarded in the entire aluminum-from-clay program [R. 453]), with the 319,835, being 99.9% of the 320,093 war procurement production contracts which were as of December 31, 1949, administratively settled under the Contract Settlement Act of 1944.

Argument.

The decision sought to be reviewed herein is a political decision and not a legal one. The reason given for the decision discloses that it was policy and not law which motivated the court and that the decision was based on that ground. In its effort to constitute itself an "arm of executive power" the learned Ninth United States Court of Appeals used the device of interpretation where no ambiguity or doubt existed to amend the War Mobilization and Reconversion Act by judicial deletion of significant language.

It is respectfully urged that this decision if permitted to stand will approve the dangerous doctrine that courts in America may forsake their classic function of declaring what the law is and under the mask of interpretation, may enter the field of legislation and change of statute, so as to assist in the implementation of an executive design.

Mr. Justice Jackson stated the concept of a court which we respectfully approve in a speech before the American

Law Institute on May 20, 1948, as reported in A. B. A. Journal, Vol. 34, pp. 535-6, as follows:

> "The concept which dominates all Communist teaching has been stated by Soviet authority in these simple words: 'The Court has been, and still remains, as it ought to be according to its nature—namely, one of the organs of governmental power, a weapon in the hands of the ruling class for the purpose of safeguarding its interests.' "
>
> ". . . Our concept of the Court presupposes its acceptance of decisions on policy by the legislative majorities that from time to time prevail, except where an overriding policy is set forth in the Constitution."

So serious a charge should be substantiated by proof and not mere assertion.

That the learned court was concerned with policy is shown by its own words. The decision shows [R. 549] that it was concerned with the number of contracts of a similar character that were involved, set the number at 100,000 or more and said that if such a mass of litigation were to be taken to court it would swamp the judiciary.

It is most respectfully urged that when the contractual rights of litigants are submitted to a court for decision, the number of similar contracts that exist and the impact thereof on the Judiciary is a question of policy, not of law. If the law is inadequate, it is the duty of Congress to correct it—not for the Court to do so.

In the instant case the learned Court erred in the matter of the policy involved. The contract in the instant case was not among the 100,000 contracts the learned

court wished to settle administratively under the Contract Settlement Act rather than judicially. The vast majority of "prime contracts" were "prime contracts for war production." We are not concerned with this mass of contracts. The War Mobilization and Reconversion Act of 1944, Sec. 202, and the Contract Settlement Act of 1944 together provide a system of termination and administrative settlement for "prime contracts for war production." Our contract is among the relatively few which, although "prime contracts," are not "prime contracts for war production." Our contract is a prime contract for experimentation.

Director Bunker of the Aluminum Division accurately defined the present contract as follows:

> "It should be understood that this plant is an experimental unit with the sole objective of determining whether or not the process can be applied successfully to the production on a large scale of alumina from anorthosite and/or clay." [R. 460.]

Other prime contracts which are outside the act as not being "prime contracts for war production" would be "prime contracts for non-production services," "prime contracts for transportation," prime contracts for sale of articles not produced by the seller. There are probably many others.

It should be noted that the Contract Settlement Act of 1944 (Public Law 395) (Chapter 358) was already passed when the War Mobilization and Reconversion Act of 1944 was passed. (Public Law 458) (Chapter 480).

Thus the term "prime contract" had already been defined in the Contract Settlement Act when the term "prime contract for war production" was used in Section 202 of

the War Mobilization and Reconversion Act of 1944. The terms are not equivalents. The term "prime contract for war production" is a certain type or class of contract within the general term "prime contract." The words "for war production" were placed in the statute to distinguish the type of prime contract with which Section 202 proposed to deal from other types of "prime contracts" with which it was not concerned.

The holding by the learned Court that the two terms were equivalent had the effect of deleting the words "for war production" from the text of Section 202 (*supra*), wherever the term was used therein. This constitutes legislation, pure and simple, and is not a valid exercise of the judicial process, assuming that there is a shred left to the doctrine of the separation of powers as set forth in the Constitution of the United States.

A reading of Title II, denominated Demobilization and Reconversion Policies, discloses that a particular type of operation was considered. Only one type of prime contract exists which will make Title II (*supra*) logical and sensible. It referred to the situation where a contracting agency contracted with a particular plant owner to produce certain articles of war procurement in his plant. The demobilization policies being set were to effect a change-over of the production of such a plant so as to permit it to produce for non-war use.

In no other category of prime contract do the words make sense. They use the term "work in process"—this term refers to parts for an assembly line, or partially completed articles of production—any material upon which work has been done for use in an item of production.

The term "work in process" is keyed to the term "prime contract for war production" in Section 202 because "work in process" under any *such* contract is referred to. The words *such contract* cannot mean any prime contract because they are used in the single sentence which makes up Section 202 and refer to the only type of contract mentioned therein, to-wit: "prime contracts for war production."

The words would not be appropriate to apply to a *prime contract for services,* a *prime contract for transportation,* or a prime contract for experimentation or research.

They are clearly referring to the production items of a plant which are being produced for war use. They distinguish such production items from production for non-war use.

Later they refer to the contracting agencies being obligated to survey their *"product and material requirements."* Again items of war procurement under prime contracts for production are clearly indicated.

The whole Title clearly refers to the establishing of policies concerning prime contracts for war production,[2] such as have been indicated, and makes mandatory the

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[2]The Solicitor General further erred in his comparison of war production contracts with national defense contracts. This Court properly took judicial notice of the situation in 1916, in *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 80 L. Ed. 688, and determined that a contract involving a project to construct a dam to create power to produce munitions during War I, was at the time of the decision in 1936 a part of the national defense assets for use in the event of a future war. As power for munition production during War I was, so also is an experimental project to develop a domestic supply of the strategic war metal aluminum a part of the continuing national defense.

establishing of policies for the change-over of plants engaged in producing war items to plants producing non-war items and an orderly return to peace activity.

Thus the stated anxiety of the learned Court lest the Judiciary be swamped with cases was really without foundation. It was the Court's own error of holding that the term "prime contract" and the term "prime contract for war production" meant the same thing which raised the policy problem.

It is a familiar axiom of mathematics that the whole is equal to the sum of all its parts. As a corollary it follows that a part is less than the whole. The learned trial court has disagreed with this corollary and held that a part of the whole term "prime contract" is equal to the whole term. We have demonstrated that such a holding is erroneous and that it was unnecessary to go to the length the Court did to protect what it considered a matter of policy.

Since the Court has held that our contract is a *contract for experimentation,* by acknowledging that the motivation for the contract was to determine the feasibility of commercially extracting aluminum from our native anorthosite ores [R. 544], it is not a *contract for war production.* Since it is not a contract for war production, it cannot be terminated under Section 202 of the War Mobilization and Reconversion Act of 1944 which legislates exclusively in the field of contracts for war production.

Therefore the termination of the contract by Reconstruction Finance Corporation under the authority of Section 202 (*supra*) was an unauthorized nullity. It follows that our contract is merely one which has been breached by Reconstruction Finance Corporation; that no

administrative procedure for its settlement has been imposed by Statute, and that a suit for injunctive and other relief is the proper course for the party aggrieved.

Wherefore, petitioner respectfully prays that this Honable Court rehear the Petition for Writ of Certiorari and grant it as prayed.

Respectfully submitted,

MONOLITH PORTLAND MIDWEST COMPANY,
a corporation,
WELBURN MAYOCK, and
JOSEPH T. ENRIGHT,
By WELBURN MAYOCK,
Counsel for Petitioner.

Of Counsel for Petitioner:

ALFRED L. BLACK, JR.,
DONALD J. DUNNE.

Certificate of Counsel.

The undersigned hereby certify that this Petition is presented in good faith and not for delay, and in the opinion of counsel is upon intervening substantial grounds.

WELBURN MAYOCK, and
JOSEPH T. ENRIGHT,
By WELBURN MAYOCK,
Counsel for Petitioner.

APPENDIX.

In the Supreme Court of the United States, October Term, 1949.

Monolith Portland Midwest Company, a corporation, Petitioner, vs. Reconstruction Finance Corporation, a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Ninth Circuit, entered on the 21st day of December, 1949.

OPINION BELOW.

The Court of Appeals Opinion is reported at 178 F. 2d 854 [R. p. 543].

JURISDICTION.

The jurisdiction of the Court is invoked under Section 240 of the Judicial Code, as published in 28 U. S. C. A. Section 347a—1948 Edition.

LAWS INVOLVED.

The Contract Settlement Act of 1944 (41 U. S. C. A. Sections 101, *et seq.*);

The War Mobilization and Reconversion Act of 1944 (50 U. S. C. A. App., Sections 1651, *et seq.*);

Rules 12 and 56 of the Federal Rules of Civil Procedure, promulgated by this Court and the due process requirement of the Fourteenth Amendment to the Federal Constitution.

Questions Presented.

This petition presents for review:

(1) The first Federal Appellate Court decision interpreting the above war statutes in basic particulars;

(2) Whether or not an experimental contract—which provided for a trial run of a process, which would, if successful, permanently end our Nation's dependence upon overseas shipment of bauxite (the basic raw material needed in alumnia manufacture)—is a prime contract for war production within the War Mobilization and Reconversion Act of 1944;

(3) If the contract is a prime contract for war production, is the procedure of the Contract Settlement Act of 1944 elective, exclusive, or did Congress in fact provide therein that none of the contractor's rights either substantively or procedurally should be impaired thereby?

(4) Has the Petitioner been denied its day in Court by a summary dismissal upon an issue not pleaded, which was caused by and resulted from a misconstruction of this Court's decisions as to the proper use of affidavits upon a motion to dismiss?

Reasons Relied Upon.

I.

The Contract Settlement Act of 1944, and the War Mobilization and Reconversion Act of 1944, constitute important legislation which has not been considered by this Court. New and important Federal questions are presented:

(a) The District Court held that the questions involved were new and novel, and that irreparable damage might be sustained in the event of a reversal of its judgment [R. pp. 511, 513];

(b) The Court of Appeals found no Federal case in point and relied upon a Supreme Court of Minnesota decision. *Stevens v. Federal Cartridge Corporation*, 226 Minn. 148, 332 N. W. 2d 312;

(c) This Court, in the case *Lichter v. U. S.* (1948), 334 U. S. 742, 68 Sup. Ct. 1294, 92 L. Ed. 1694, said that the Congressional approach involved in World War II legislation was a departure from its policy for World War I;

(d) The war conversion legislation and policies of Congress related thereto should be rendered clear and certain, as national economic health is involved as well as our national ability to gain quick and efficient industrial support in any emergency effort found to be needed to put industry back into another war effort; and

(e) The subject matter of this contract was a gigantic effort to permanently better our national industrial economy and our national defense necessities.

II.

The decision, if permitted to stand, will form a precedent for the proposition that a Federal Court, under the guise of interpretation, may amend a clear and unambiguous provision of a statute by deleting significant words therefrom.

III.

That prompt clarification of the litigants' rights is important, as, if the property involved were disposed of prior to the final conclusion of litigation, Respondent could lose from seven to twelve millions of dollars needed to reconstruct the plant, or Petitioner could lose, even if successful, the time involved in constructing the plant in addition to the added exhaustion of the life of its patents.

IV.

The decisions of this Court and the rules of Federal procedure were misconstrued and misapplied in the dismissal of this action without any issue supporting it.

STATEMENT OF THE CASE.

Petitioner and Respondent's predecessor agreed to construct a plant and to test therewith the feasibility of extracting alumina from its abundant source in the clays of this Nation [R. pp. 20-68].

Petitioner was to furnish the process, its knowledge concerning clay processing, and to provide the necessary personnel to supervise the acquisition of the needed properties and the designing, constructing and operating of the experimental test plant.

Respondent was to provide in advance the amounts of money required for the acquisition of the necessary properties, the designing and constructing of the plant, and for the cost of a test run of the plant.

The consideration to be received by Petitioner was:

(1) Any increase in the value of its process resulting from the test run;

(2) An option to purchase the plant after the completion of the test run; and

(3) A nominal fee during the period of the test run.

The consideration to be received by Respondent was:

(1) A plant constructed at cost;

(2) And operated for a trial period at direct cost plus a nominal fee;

(3) A right to the further services of Petitioner at cost; and

(4) A license for the use of the process in this and other plants.

On July 24, 1946, when construction of the plant was nearing completion, Respondent terminated the contract by a notice to Petitioner directing Petitioner to cease construction of the plant [R. p. 166]. The next day by telegram and letter Petitioner notified Respondent of its claims for this breach, money paid out in performance, and asked Respondent to advise its desires [R. p. 438]. They immediately conferred and on August 21, 1946, Petitioner again in writing made claims in the event Respondent would not permit Petitioner to continue in possession of the plant to test the process [R. pp. 440, 443]. On September 10, 1946, Respondent gave another and final notice of cancellation of the contract [R. p. 69]. On October 21, 1946, Respondent removed part of the equipment from the plant, which equipment was necessary to test the process [R. p. 13].

On November 7, 1946, Petitioner filed suit in the State of California, seeking a declaration of its rights, an injunction to maintain the *status quo* of the property, and for damages. The suit was removed to the United States District Court Respondent by its answer admitted the removal of the equipment [R. p. 102], and at no time has it pleaded by answer that the contract was a prime contract for war production or that Petitioner has in any manner failed to exhaust an administrative procedure [R. pp. 95, 208]. On February 13, 1947, Petitioner received notice from Respondent that it intended to declare the plant and its equipment surplus [R. p. 128], as a preliminary to its disposal. Upon Petitioner's application, the District Court issued, on February 25, 1947, its preliminary injunction restraining the Respondent from declaring the plant to be surplus and ousting Petitioner from possession of the plant and directing and maintaining a *status quo* [R. p. 139].

On December 30, 1947, Respondent for the first time by motion supported only by the conclusions contained in an affidavit of its associate director [R. p. 399] sought the dismissal of the action. The grounds were that Petitioner had not exhausted an administrative process it asserted was created by the Contract Settlement Act, and that the War Mobilization and Reconversion Act authorized the cancellation of this contract [R. p. 397].

Petitioner resisted this motion by allegations of its pleadings, affidavits and an amendment to its complaint, all of which created many important ultimate issues of fact, including,

> "whether or not Petitioner had an election and/or had exhausted the administrative provisions of the Contract Settlement Act,"

and

> "whether or not the contract was a prime contract for war production within the provisions of the War Mobilization and Reconversion Act," [R. pp. 434, 450, 461, 502].

On January 25, 1949, the District Court dismissed the action [R. p. 505]. On February 10, 1949, the District Court continued the preliminary injunction in force pending final determination of this cause, because it found that new and novel questions of law were involved, which had not been decided by a United States court of appellate jurisdiction, and that irreparable damage might result in the event of a reversal of the case [R. p. 513].

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Ninth Circuit, commanding that

Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 12,200, Monolith Portland Midwest Company, Appellant, vs. Reconstruction Finance Corporation, Appellee; and that said judgment of the United States Court of Appeals for the Ninth Circuit and the judgment of the United States District Court for the Southern District of California, Central Division, be reversed by this Honorable Court and that your Petitioner may have such other and further relief as to this Honorable Court may seem meet and just.

Respectfully submitted,

MONOLITH PORTLAND MIDWEST COMPANY,
a corporation,

WELBURN MAYOCK and
JOSEPH T. ENRIGHT,

Counsel for Petitioner.

Of Counsel for Petitioner:

ALFRED L. BLACK, JR.,
JOSEPH T. ENRIGHT,
DONALD J. DUNNE.

In the Supreme Court of the United States, October Term, 1949.

Monolith Portland Midwest Company, a corporation, Petitioner, vs. Reconstruction Finance Corporation, a corporation, Respondent.

SUMMARY ARGUMENT IN ACCORDANCE WITH RULE 38 IN SUPPORT OF PETITION FOR CERTIORARI.

PETITIONER CONTENDS THAT WAR CONVERSION LEGISLATION AND CONGRESSIONAL POLICIES SHOULD BE RENDERED CLEAR AND CERTAIN TO PROTECT THE ECONOMIC HEALTH OF THE NATION AND ITS ABILITY TO QUICKLY AND EFFICIENTLY MOBILIZE FOR ANY EMERGENCY.

I.

THEY CONSTITUTE A NEW APPROACH.

The Congressional policy for World Wars I and II has been compared by this court in *U. S. v. Bethlehem Steel,* 315 U. S. 289, 308, 86 L. Ed. 855, 867, and *Lichter v. U. S.,* 334 U. S. 742, 92 L. Ed. 1694, and it was there decided that the principal difference between the government's handling of contracts during the first war and during and after the second war was that there should be no legal taking of any of the rights of the contractor arising during or in connection with the prosecution or conclusion of the second World War.

The Court of Appeals failed to carry this policy into effect when it judicially interpreted the provisions of the War Mobilization and Reconversion Act of 1944 (hereafter referred to as W.M.A.).

The W.M.A. authorized the contracting agencies to terminate certain contracts by virtue of Section 202 (50 U. S. C. A. App. 1657), which is as follows:

> "Any contracting agency shall terminate prime contracts for *war production* whenever in the opinion of the agency the performance under such contracts will not be needed for the prosecution of the war. . . ." (Emphasis added.)

The appellate decision starts itself off by assuming that the main question is whether a contractor may sue "The United States for damages." The Reconstruction Finance Corporation is not the United States.

Proceeding from this sovereign status assumed by the Court of Appeals, it was easy for it to assume all other questions, such as the nature of the contract and its remedies to be in favor of R.F.C.'s position.

The prime error is that this contract between private corporations is of no interest to the United States Government proper except as it has been made such by virtue of Section 202 of W.M.A.

It could not be made of interest within that Act unless it were in fact and were found to be a "prime contract for war production." War production is the keynote to the termination power given by Section 202 and in many places in the Act production is specified as the only thing being considered.

The Court of Appeals was led to an extreme position when it held that Section 20(b) of Contract Settlement Act of 1944 (hereinafter referred to as C.S.A.), authorized a C.S.A. created body to pre-judge what should or not be classed as a contract for war production under Section 202 of the termination statute.

The Court of Appeals ignored the basic policy-fixing section in C.S.A., being Section 20(e) which is as follows:

> "Nothing in this Act shall be deemed to impair or modify any war contract or any term or provision of any war contract or any assignment of any claim under a war contract, without the consent of the parties thereto, if the war contract, or the term, provision, or assignment thereof, is otherwise valid."

The Court of Appeals' decision that the Act is a mandatory remedy is diametrically opposed to this limitation in Section 20(e) that the Act shall not be used "to impair the rights of any contractor."

The Court of Appeals of necessity was precluded from noting or considering Section 20(e) if it were to hold the contractor's rights were by C. S. A. to be impaired to the extent that they must confine their remedies to C.S.A.

The court's opinion is not supported by the record in that part in which it bases its decision upon the practical considerations attending the existence of 100,000 War Department contracts. There were but four experimental contracts, of the kind considered herein, awarded in the entire aluminum-from-clay program [R. p. 453]. This experimental contract was succinctly and accurately described and defined by Director Bunker of the Aluminum Division as follows:

> "It should be understood that this plant is an experimental unit with the sole objective of determining whether or not the process can be applied successfully to the production on a large scale of alumina from anorthosite and/or clay." [R. p. 460.]

II.

The Record Does Not Sustain the Opinion.

The Court of Appeals' decision erroneously concluded that ninety days had not passed after Petitioner's notice, accompanied by an offer to negotiate, had been given of its termination claim. This is contrary to the record as it shows that on July 24, 1946 [R. p. 166] Respondent "terminated" Petitioner's contract within the language of Subsection (d) of Section 3 and Subsection (b) of Section 11 of C.S.A., which provides that the whole or any party of work being terminated or suspended constitutes a termination within C.S.A.

On July 25. 1946, Petitioner advised Respondent that it intended to present a termination claim and offered to negotiate in connection therewith [R. p. 438]. The Court of Appeal's statement that the only intent that can be gathered from the letters giving notice is that Petitioner will seek *"damages"* if Respondent fails to perform, would seem to make it rather difficult to distinguish this from a notice that Petitioner was intending to present a termination claim. This, however, was the particular in which the Court of Appeals justified itself by its asserted unwillingness to engage in legal legerdemain.

This statement in the opinion is on a par with the reference to these two letters by the Court of Appeals [R. p. 552], when it said that these letters were "written after Appellant received instructions to suspend work on the plant" but "prior to the date it was notified that the contract was terminated." This glaring overlooking of

C.S.A. Sections 3(d) and 11(b) emphasizes two things. The first is that the Court of Appeal's approach was that it was reviewing a damage claim against the United States, and the other, the futility of attempting to correctly decide cases upon issues not made by the pleadings. But a slight consideration of these two sections of the statute would have quickly found therein that, as to C.S.A., a termination is said to be "to cease or suspend all *or a substantial part of the work*" without terminating the contract. Giving the proper effect to these parts of the statute in its analysis would have compelled the Court of Appeals to reverse the case as its stated premise would then demonstrate that the termination was actually followed by a notice that Petitioner would claim damages for termination and that it was willing to negotiate and,—that more than ninety days had elapsed thereafter prior to suit.

On November 7, 1946, or one hundred five (105) days after this Petitioner had advised Respondent of its intention to make a termination claim by claiming damages, and indicated a willingness to negotiate,—this court action was filed [R. p. 77]. If this had been considered by the Court of Appeals, it would have been a complete answer to its inquiry as to the expiration of ninety days in connection with any part of C.S.A.

The Court of Appeals erred in not considering Petitioner's presentation of proofs concerning reimbursables as being in this regard a compliance with C.S.A. Such suppression of the record permitted the Court of Appeals to say these were included within C.S.A. for penal pur-

poses without giving the legal advantage which came from the admitted proof of filing, negotiations and requests in connection therewith. These were completely adequate, as shown by the record, upon any theory which could be claimed as to compliance with C.S.A. provisions, and admittedly had occurred many times prior to the ninety days preceding the filing of the case.

Ignoring Section 20(e), and assuming this to be a "prime contract for war production" and that sovereignty was granted by C.S.A. to any act performed by R.F.C. in disposing of its contractual liabilities it found on its books at the end of World War II, enabled the court to ignore the plain statement of intent of Congress as follows:

> "*Remedial Provisions:* A further feature of the bill that deserves approval is that relating to the rights of claimants. A procedure has been set up that will, in my opinion, give any claimant every reasonable right to obtain justice without going into court with the consequent expense and delay, yet if the claimant does not wish to avail himself of such procedure there is nothing in this bill to prevent him from going into court to establish any right that he feels belongs to him—or such claimant may avail himself of the procedure provided in the act, designed for speedy settlement of the claim, and if not satisfied may then go into court. *No existing remedy that a claimant now has under the law is taken from him, but in addition thereto he is given an opportunity to avail himself of a settlement procedure that can facilitate*

his settlement if he so desires. This is fair and just to all parties concerned, Government and claimant." (Congressional Record, Vol. 90, Part 5, 78 Congress, Second Session, p. 6153.) (Emphasis added.)

III.

Misapplication,—Court's Summary Procedure Rules.

The Court of Appeals ignored Rule 12 of the Federal Rules of Civil Procedure established by this court. It specifically provides that a motion to dismiss, for failure to state a claim upon which relief can be granted (failure to exhaust an administrative remedy) shall be treated as a motion for summary judgment and disposed of as provided by Rule 56. Recently this court in *Fountain v. Fillson,* 93 L. Ed. Ad. Op. 768, approved the holding in *Farrel v. District of Columbia* (U. S. Ct. of App. D. C.), 153 F. 2d 647, 648, that under Rule 56 affidavits can be used only for the purpose of discovering whether there is an issue of fact and not for deciding such an issue. The record contains no pleading upon the issue as to whether or not Petitioner complied with provisions of C.S.A. yet the dismissal was upon this ground, and all this notwithstanding Petitioner's affidavits which Petitioner believes demonstrated that it had complied with C.S.A. [R. pp. 434, 450].

This disregard of this court's rules, is matched by a disregard of the statutory provision in C.S.A., Section 13[c][3] which limits the trial court's authority to a "remanding" or retaining for trial the controversy.

IV.

Great and Far-reaching Consequences Possible.

A review of the Court of Appeals' opinion is necessitated by the importance of the subject matter here involved. Alumnia is in great and needed demand for industrial and defense purposes. It is produced from a raw material called bauxite, substantially all of which is imported. This venture was an effort to permanently solve this domestic shortage [R. pp. 465, 490].

The official agency of the U. S. Government best qualified to pass upon the problem has published this report upon Petitioner's process:

> "Small-scale laboratory tests supplemented by pilot-plant runs have demonstrated that the alumina and soda occurring in the Wyoming anorthosite from the Laramie Range can be extracted and recovered satisfactorily by the lime-soda process." [R. p. 501.]

It may be added that Respondent has not disagreed with this Bureau of Mines position.

The record definitely shows that enemy submarines had reduced our needed imports of bauxite (approximately 3,000,000 tons per year) [R. p. 451] early in World War II to dangerous proportions. It surely requires no proof at this time to convince:

(1) that the threat of the next war carries with it just as great an enemy submarine menace, and

(2) that the time taken, four years [R. pp. 451 and 166], to bring this experimental plant to "near comple-

tion" could conceivably be many times greater than a kind providence would allow for a solution of this shortage in the next holocaust. This, added to the staggering losses to the parties herein which could result from a premature divorcing of this plant from the process it was intended to test, would, we respectfully urge, be a reason to hope that this record may be found worthy of review by this court.

Respectfully submitted,

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a corporation,
WELBURN MAYOCK and
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